REPUBLIC OF KENYA.

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELCA CASE NO. 35 OF 2017

MARY VODEMBEKA MUJIVANE.....APPELLANT/APPLICANT

VERSUS

ELIUD STANLEY OMIDO *(Suing as a legal representative of*

JACOB OMIDO).....RESPONDENT

RULING

The application is dated 15th July 2019 and is brought under Order 45 Rules 1, 2 & 3 of the Civil Procedure Rules, Section 3 (a) of the Civil Procedure Act seeking the following orders;

1. That service of this application be dispensed with in the first instance.

2. That this honourable court be pleased to review and set aside judgment entered on 19th March, 2019 striking out the applicant's appeal.

3. That the appeal herein be heard inter-parties.

It is based on the grounds that the applicants appeal proceed exparte as the appellant was never served in accordance with the laws. That the applicant was never accorded audience of the court and no notification of the hearing thereto were ever served upon the applicant. That the applicant learnt about the judgment through a third party.

The respondent submitted that the application lacks merit and should be disallowed. That the applicant was duly served and her only complaint is that service was improper as no orders for substituted service was made or application made. That the applicant was properly served through her last known address. That the applicant does not deny having received the hearing notice through her postal address. That the applicant does not disclose the name of the third party, the date when she learnt of the judgment and since she was the appellant what steps she took to prosecute her appeal. That the appeal herein was not struck out for non-attendance or want of prosecution, but the appeal was argued through written submissions and therefore the court made its judgment on merit. That the court file herein has never been misplaced and therefore the letter dated 6th June, 2019 is to hoodwink the court as the same do not indicate when the said advocates made the alleged efforts to have the file traced. That litigation must come to an end since the applicant never made any effort to prosecute the appeal since 2014. That the application should thus be dismissed with costs.

This court has considered the application and the submissions therein. It is based on the grounds that the applicants appeal proceeded exparte as the appellant was never served in accordance with the laws. This court is now asked to review and set aside it's judgement. **In the case of Kwame Kariuki & Another Vs. Mohamed Hassan Ali & 4 Others [2014] eKLR,** the Court observed that:-

> *"It is evident that the relief of review is only available where an appeal has not been preferred as against an order. Once an appeal is preferred then the door is closed on review and for good reason, as the appellant is then seeking a re-examination of the affected order on its merits, and the Court whose order is appealed from cannot purport to review or further interfere with the said order as such action is likely to affect the outcome of the appeal."*

In the case of *Mwihoko Housing Company Limited Vs Equity Building Society [2007] 2 KLR 171* is relevant. It was held, that;

> *"A review could have been granted whenever the Court considered that it was necessary to correct an error or omission on its part. The error or omission must have been self-evident and should not have required an elaborate argument to be established. It would neither have been sufficient ground of review that another Court could have taken a different view of the matter nor could it have been a ground that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or another provision of law could not have been a ground for review. There was no discovery of a new and*

important matter or evidence which after due diligence was not within the knowledge of the appellant at the time the judgment and decree was passed. There was no error apparent on the face of the record or any other sufficient reason to justify review. In the Court of Appeal decision of Rose Kaiza Vs Angelo Mpanju Kaiza 2009, the Court was categorical that;

"An application for review under order 44 Rules 1 of the Civil Procedure Rules must be clear and specific on the basis upon which it is made…"

Order 45, Rule 1(b) is clear that for the court to review its decision, certain requirements should be met. This section provides as follows:

"(1). Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed.

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

The aforesaid rule is based on section 80 of the Civil Procedure Act, Cap. 21 Laws of Kenya which states as follows:

"Any person who considers himself aggrieved-

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act.

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Under Section 80 of the Civil Procedure Act, the court has unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. However this discretion should be exercised judiciously and not capriciously. I see no mistake or error or omission on the part of the court when it proceeded with the matter after satisfying itself that the appellant had been properly been served. In Court of Appeal, *Civil Appeal No. 2111 of 1996, National Bank of Kenya Vs Ndungu Njau,* the Court of Appeal held that;

"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evidence and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceed on an incorrect expansion of the law".

From the above provisions of the law, authorities cited and facts of this case I find that the applicant has failed to show any mistake or error apparent on the face of record and/or any sufficient reason to enable this court set aside its decision. I find this application is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 5TH NOVEMBER 2019.

N.A. MATHEKA

JUDGE